

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-01005-WYD-KMT

TROY ANDERSON,

Plaintiff,

v.

STATE OF COLORADO, DEPARTMENT OF CORRECTIONS,
SUSAN JONES, in her official capacity as Warden of Colorado State Penitentiary, and
ARISTEDES W. ZAVARAS, in his official capacity as Executive Director of the Colorado
Department of Corrections,

Defendants.

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

INTRODUCTION

This case arises because Defendant Colorado Department of Corrections (“CDOC”) refuses to provide Plaintiff Troy Anderson, based on conduct resulting from his mental illness, with services it provides other prisoners, while simultaneously denying him medications and treatment requested by CDOC’s doctors that would alleviate that conduct. He challenges the procedures and conditions of his confinement under the Eighth Amendment, the Due Process Clause of the Fourteenth Amendment, the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 *et seq.*, and section 504 of the Rehabilitation Act of 1973 (“RA”), 29 U.S.C. § 794.

FACTS

Mr. Anderson’s History of Mental Illness

Since he was a young child, Mr. Anderson has suffered from severe mental illness, likely caused by an organic brain syndrome. Compl. (Doc. No. 1) ¶¶ 8, 15-29. Following his conviction in 2000, he was placed into administrative segregation (“ad seg”) at the Colorado State Penitentiary (“CSP”) where he remains. *Id.* ¶¶ 45, 50. In the fall of 2001, he received mental health treatment at the San Carlos Correctional Facility (“SCCF”), a CDOC facility for mentally ill prisoners. *Id.* ¶¶ 51-53. After only one month of treatment there, he was returned to CSP against the wishes of his SCCF therapists and doctors. *Id.* ¶¶ 54-55.

Mr. Anderson has been variously diagnosed by doctors affiliated with CDOC as having severe adult Attention Deficit Hyperactivity Disorder (“ADHD”), Cognitive Disorder NOS, Anti-Social Personality Disorder, and Intermittent Explosive Disorder and as displaying traits of Borderline Personality Disorder. *Id.* ¶ 56, 63, 73. However, because CDOC curtailed his stay at SCCF, additional necessary testing was not completed. *Id.* ¶ 56. Despite requests from his

therapists at CSP for neurological and other diagnostic testing, CDOC has failed to take steps to adequately determine Mr. Anderson's mental health disabilities and needs. *Id.* ¶ 57.

CDOC doctors have prescribed Wellbutrin, a stimulant, and Strattera, a non-stimulant alternative, for Mr. Anderson's ADHD. *Id.* ¶¶ 66, 93-98. These medications are not on CDOC's formulary; therefore, Mr. Anderson's prescriptions were denied. *Id.* ¶¶ 64-66. He alleges that there are no stimulant medications on the formulary. *Id.* ¶¶ 65, 90. Although his doctors appealed the denials, both appeals were denied without explanation and without allowing Mr. Anderson an opportunity to be heard on the issue. *Id.* ¶¶ 93-99. When Mr. Anderson tried to file a prison grievance on the issue, he was informed that the issue was not grievable. *Id.* ¶¶ 99-100. The formulary process was biased because one of the two decision-makers who reviewed his prescriptions had personal bias and animosity against Mr. Anderson. *Id.* ¶ 92.

Administrative Segregation

At CSP, Mr. Anderson is locked in his cell for 23 hours a day, eats all meals alone in his cell, is prohibited from touching his family during visits, and has only restricted communication with other prisoners. Compl. ¶¶ 103-06, 111, 122-24, 132, 134-39. At most, he is allowed one hour per day outside his cell, which must be used both for showering and for exercise in an indoor "day hall." *Id.* ¶ 122, 133, 137. He is never permitted to be outdoors. *Id.* ¶ 132, 135.

Because of his placement in ad seg, Mr. Anderson is denied a wide range of privileges -- beyond the basic ability to interact with others -- that he would be afforded were incarcerated in a different facility. *See generally id.* ¶¶ 102-31. For example, he is permitted only limited personal effects and minimal visits and phone calls each month. *Id.* ¶¶ 108, 114. He has access to only very limited educational programming, and is not allowed to perform his own legal

research. *Id.* ¶ 116-17. Importantly, Mr. Anderson cannot accrue good or earned time credits, which would shorten his sentence and the time before his parole eligibility. *Id.* ¶ 129.

Classification Review and Progression out of Administrative Segregation

According to CDOC's regulations, "[u]se of administrative segregation is a preventive and management assignment process and is to be distinguished from punitive and disciplinary segregation." Mot. to Dismiss ("MTD," Doc. No. 5), Ex. A at 1. While Mr. Anderson is evaluated monthly regarding his placement, he does not receive notice of these reviews, nor is he allowed to attend. Compl. ¶ 154. Further, these reviews are meaningless, as the decision to retain him in ad seg is based not on violent acts or disciplinary violations -- he has not had a conviction under the Code of Prison Discipline since 2005, *id.* ¶ 83 -- but on the arbitrary "chron" system, *id.* ¶¶ 14, 155-58, 178. This system allows officers to give negative write-ups to prisoners based on unknown, subjective criteria for vague problems such as "complaining to staff" or "bad attitude at count." *Id.* ¶¶ 157, 166. Inmates are not informed when chrons are issued, denying them notice of the allegation or any ability to rebut it. *Id.* ¶¶ 160-61. Despite this, chrons play a significant role in the monthly review process and prevent progress out of ad seg. *Id.* ¶¶ 140-51, 155, 158. There is no effective way to challenge a chron. *Id.* ¶¶ 160-61, 173-77. As chrons are unchallenged, they are often unreliable, inaccurate, or exaggerated. *Id.* Ultimately, Mr. Anderson is being held in administrative segregation for reasons he cannot challenge based on behavior that is a direct result of his disabilities. *Id.* ¶¶ 79, 84.

ARGUMENT

I. Standard of Review

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ “ *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009). The Court should “assume the truth of all well-pleaded facts in the complaint, and draw all reasonable inferences therefrom in the light most favorable to the plaintiff[].” *Dias v. City and County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009).

II. Plaintiff Only Seeks Damages Under the RA from Defendant CDOC.

Defendants argue that Plaintiff may not seek damages against them in their official capacities, as such claims are barred by the Eleventh Amendment. MTD at 4-5. The only statute under which Plaintiff seeks damages is the RA, and only against the state itself, not the individual Defendants. States waive their Eleventh Amendment immunity under the RA by accepting federal financial assistance, *Robinson v. Kan.*, 295 F.3d 1183, 1189 (10th Cir. 2002), which Plaintiff has alleged CDOC receives. Compl. ¶¶ 224-25. Plaintiff has stated a claim for damages under the RA. *See Barnes v. Gorman*, 536 U.S. 181, 185, 187 (2002). In response to Section V of the MTD, Plaintiff does not seek damages against Defendants in their individual capacity, so the qualified immunity argument is thus not relevant to this case.

III. None of Mr. Anderson’s Claims Is Barred by a Statute of Limitations.

Defendants argue that any claims accruing before May 3, 2008 are barred by the statute of limitations. MTD at 5. As Plaintiff seeks injunctive relief for ongoing violations of federal law, Defendants’ argument is inapplicable; “[b]ecause the alleged injuries continue, the claim for injunctive relief is prospective and the subject-matter persists,” and these claims are not

time-barred. *Silverstein v. Fed. Bureau of Prisons*, --- F. Supp.2d ---, 2010 WL 1258032, at *9 (D. Colo. Mar. 23, 2010). Because Plaintiff continues to suffer the harms alleged in his complaint every day that he is in ad seg, his claims are not barred by the statute of limitations. *See Nasious v. Robinson*, 2010 WL 1268135, at *4 (D. Colo. Feb. 17, 2010) (ongoing violations have no specific accrual date). Mr. Anderson only seeks damages under the RA, *see supra* Section II, for the two-year period prior to the filing of the complaint.

IV. Claims One and Two Sufficiently Allege Due Process Claims.

Claims One and Two allege that the CDOC has deprived Mr. Anderson of a liberty interest, both by placing him in restrictive conditions and denying him medications ordered by his doctors, without providing sufficient procedures to safeguard his interest. Compl. ¶¶ 181-96. To state a due process claim, a Plaintiff must allege that: (1) he possesses a protected liberty or property interest; and (2) the procedures to deprive him of this interest were inadequate under the circumstances. *Wilkinson v. Austin*, 545 U.S. 209, 225 (2005).

Despite being in custody, prisoners still retain protected liberty and property interests as “prisoners do not shed all constitutional rights at the prison gate.” *Sandin v. Conner*, 515 U.S. 472, 485 (1995); *see also Wilkinson*, 545 U.S. at 225. A prisoner possesses a liberty interest when he is subject to a restraint that “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin*, 515 U.S. at 483-84.

Once a liberty interest is established, the analysis turns to the question of whether the existing procedures adequately safeguard that interest. *Wilkinson*, 545 U.S. at 224. The sufficiency of process is determined by a three-part balancing test that evaluates: 1) the private interest that will be affected by the official action, 2) the risk of erroneous deprivation and the

probable value of additional procedural safeguards, and finally, 3) the government's interest.

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). Further, overarching all process inquiries is the requirement that process be meaningful. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

A. Claim One Sufficiently Alleges a Due Process Violation Based on Mr. Anderson's Indefinite Retention in Extreme Isolation.

Defendants do not challenge that fact Mr. Anderson has adequately pled a liberty interest in avoiding the restrictive conditions in which he is housed. MTD at 7.¹ Accordingly, the inquiry turns to whether he has sufficiently alleged that he is denied adequate procedural protections. *Wilkinson*, 545 U.S. at 224. The Supreme Court requires that individuals placed in ad seg receive periodic reviews to ensure that the deprivation of liberty remains necessary. *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983), *overruled on other grounds Sandin*, 515 U.S. at 483. These reviews are to ensure that “administrative segregation [is] not [] used as a pretext for indefinite confinement.” *Id.* While the Tenth Circuit has not addressed the specific procedures required for these periodic reviews, it is well-established that “among the most important procedural mechanisms” are: 1) the right to notice of the factual bases for a potential deprivation, and 2) an opportunity to respond. *Wilkinson*, 545 U.S. at 226. “It is equally fundamental [to the processes themselves] that the right to notice and an opportunity to be heard must be granted at a ‘meaningful time’ and in a ‘meaningful manner.’” *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Further, due process is not provided

¹ Defendants' concession makes sense. The conditions within CSP are essentially identical to those raised in *Wilkinson*, in which the Supreme Court found a protected interest for individuals, like Mr. Anderson, who are placed in a “supermax” facility. Mr. Anderson is locked in his cell for 23 hours a day, eats all meals alone in his cell, only has visitation through a glass barrier, has severely restricted communication with other prisoners, and is never allowed outside. *Compare Wilkinson*, 545 U.S. at 214 with Compl. ¶¶ 103-06, 111, 122-24, 132, 134-39.

“where the state has gone through the mechanics of providing a hearing, but the hearing is totally devoid of a meaningful opportunity to be heard.” *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987).

“[B]ecause of the potentially unlimited span of the confinement” in ad seg, periodic reviews “must amount to more than meaningless gestures.” *Rhinehart v. Gomez*, 1998 WL 118179, *4 (N.D. Cal. 1998) (internal quotation omitted). “[P]rison officials must be prepared to offer evidence that the periodic reviews held are substantive and legitimate, not merely a ‘sham.’” *Giano v. Kelly*, 869 F.Supp. 143, 150-51 (W.D.N.Y. 1994); *Sourbeer v. Robinson*, 791 F.2d 1094, 1101 (3d Cir. 1986); *McClary v. Kelly*, 4 F.Supp.2d 195, 213 (W.D.N.Y. 1998). Periodic reviews are not sufficient if they fail to demonstrate the continued need for ad seg. *Giano*, 869 F.Supp. at 150-151; *Williams v. Norris*, 277 Fed. Appx. 647, 650 (8th Cir. 2008) (“[U]ndue weight should not be given to an inmate’s past conduct” in ad seg review); *Kelly v. Brewer*, 525 F.2d 394, 399-400 (8th Cir. 1975) (same); *Sourbeer*, 791 F.2d at 1101. Moreover, the longer a prisoner is retained in ad seg, the more onerous the requirement that the prison provide legitimate process. *Giano*, 869 F.Supp. at 151.

Here, Defendants assert that because the prison has policies requiring regular reviews, Mr. Anderson fails to sufficiently plead a claim. MTD at 8-10. Defendants, however, do not address Plaintiff’s assertions that the reviews are not meaningful and rely on arbitrary and subjective bases. While Defendants’ list of procedures may make it sound as if Mr. Anderson receives process, Defendants only cite policy, not the actual actions of its employees. Even if all of the listed reviews are taking place, which is in dispute, Mr. Anderson still states a valid due process claim because he asserts that the reviews are arbitrary and meaningless. Compl. ¶¶ 157,

169, 180-87. He alleges that the fundamental requirements of due process -- notice and an opportunity to be heard -- are not provided. *Id.* ¶¶ 170-72, 187. Further, he alleges that the reviews are meaningless, as a prisoner may be denied progression solely based on a chron, an arbitrary demerit issued by a prison guard, using subjective and unknown criteria. Mr. Anderson has adequately pled a due process claim as he possesses a liberty interest in avoiding ad seg, and alleges that this interest is not protected by adequate and meaningful process.

B. Claim Two Sufficiently Alleges a Due Process Claim That the CSP Formulary Process Is Inadequate.

Mr. Anderson's second due process claim alleges that he has a liberty interest in receiving medications he was prescribed, and that he is being denied these medications based on a process that is inadequate. Compl. ¶¶ 188-96. Defendants argue that this claim fails because he does not have a protected interest in receiving his ordered medications, and assert that this claim "is more properly brought under the Eighth Amendment." MTD at 10. This misunderstands the claim: Plaintiff is not, through his due process claim, requesting the medication itself; he is challenging the process the prison uses to deny medications prescribed by its own doctors. Compl. ¶¶ 192-96. He claims that once the prison physician has deemed the medication necessary, he must be provided adequate process to ensure that the denial has a reasonable basis and is legitimate. *Id.*

Mr. Anderson asserts a protected liberty interest in receiving the medications a prison doctor has deemed necessary for him. *Id.* ¶¶ 189-91. The standard for determining if a liberty interest exists is whether the official action "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 483-84. As

prisoners typically receive the medications they are ordered by prison medical staff, denial of such medications establishes an “atypical and significant hardship” that triggers due process protections. Defendant does not argue that the procedures surrounding CSP’s refusal to provide medications to Mr. Anderson are sufficient. MTD at 10-11. As set forth above, Mr. Anderson has pled sufficient facts to demonstrate that he possesses a liberty interest in receiving his ordered medications, and that the prison’s denial of medications was not accompanied by adequate process. Compl. ¶¶ 85-101, 188-96.

V. Mr. Anderson’s Allegation That Defendants Have Provided Him from Being Outdoors for Nine Years States a Claim of Cruel and Unusual Punishment.

Claim Four asserts that Mr. Anderson’s Eighth Amendment rights are violated by Defendants’ refusal to permit him any access to the outdoors, or to sunlight and fresh air. Compl. ¶¶ 132-39, 207-212. The Eighth Amendment establishes a duty to “provide humane conditions of confinement” in that the basic human needs of prisoners are met.² *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The Tenth Circuit law is clear that denial of all outdoor exercise puts a prisoner’s health and safety at risk and, accordingly, such denial raises an Eighth Amendment claim. *Fogle v. Pierson*, 435 F.3d 1252, 1260 (10th Cir. 2006).

Indeed, in *Fogle*, the Tenth Circuit held that the Eighth Amendment was violated in circumstances almost identical to Mr. Anderson’s. In that case, Mr. Fogle was housed in the Limon Correctional Facility in ad seg, and for three years “was kept in his cell 23 hours a day 5 days each week, and was denied access to . . . outdoor exercise.” *Id.* at 1256-57, 1260. During

² To adequately raise an Eighth Amendment claim, an individual must allege: 1) that the condition of confinement is sufficiently serious; and 2) that the officers were aware of the risk or condition but were deliberately indifferent. *Ajaj v. United States*, 293 Fed. Appx 575, 582 (10th Cir. 2008). Both prongs are sufficiently pled by Mr. Anderson.

this time he was “allowed to access a cell with a pull-up bar a few times each week.” *Id.* at 1260 n.4. Based on those facts, the Tenth Circuit recognized an adequately pled Eighth Amendment claim. *Id.* at 1260. As the facts alleged here are essentially identical to Mr. Fogle’s, *see* Compl. ¶¶ 13, 122, 132-39, differing only in that Mr. Anderson’s deprivation is *six years* longer, he has sufficiently pled an violation based on failure to provide outdoor exercise.³

IV. Plaintiff Has Stated A Claim for Disability Discrimination Under the ADA and RA.

Title II of the ADA prohibits discrimination on the basis of disability by public entities such as the State of Colorado. 42 U.S.C. § 12132. “To state a claim under Title II, the plaintiff must allege that (1) he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity’s services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability.” *Robertson v. Las Animas County Sheriff’s Dep’t*, 500 F.3d 1185, 1193 (10th Cir. 2007). The standards for violation of the RA are the same as those of Title II, and prohibit discrimination by recipients of federal funding. 29 U.S.C. § 794. Defendants agree with these standards. MTD at 13-14.

Mr. Anderson has properly alleged that he is an individual with a disability, Compl. ¶¶ 1, 214, 226, and Defendants do not challenge this. As explained in greater detail below, he is

³ Defendants rely on *Bailey v. Shillinger* for the proposition that “courts have consistently rejected Anderson’s contention that the lack of outdoor exercise or fresh air to breath [sic] constitutes a *per se* violation of the Eighth Amendment.” MTD at 12, citing *Bailey*, 828 F.2d 651, 653 (10th Cir. 1987). To the contrary, *Bailey* held that “some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates, and some courts have held a denial of fresh air and exercise to be cruel and unusual punishment under certain circumstances.” *Id.* at 653. Numerous courts have relied upon *Bailey* for the opposite of Defendants’ contention, that is, as the Tenth Circuit’s establishment of the right to outdoor exercise. *See Fogle*, 435 F.3d at 1260; *Perkins v. Kan. Dep’t of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999); *Parker v. Ritter*, 2010 WL 1286081, at *7 (D. Colo. Mar. 25, 2010).

“qualified” because he is an inmate of CDOC who, with reasonable modifications, would meet the essential eligibility requirements for participation in the programs at issue. *See* 42 U.S.C. § 12131(2) (defining “qualified individual”). Defendants have discriminated against Mr. Anderson by segregating him based on his disability, denying him benefits and services, providing him benefits and services that are not equal to those afforded others, and refusing to make reasonable modifications to their policies to avoid discrimination. *See, e.g.*, 28 C.F.R. § 35.130(b)(1)(i), (ii), (b)(7) & (d); *see also Alexander v. Choate*, 469 U.S. 287, 301 (1985) (Discrimination under the RA can consist of a denial of a reasonable accommodation).⁴

Mr. Anderson asserts that CDOC violates the ADA and RA under three different theories. First, he alleges that CDOC’s policy of denying access to the most common medications for ADHD discriminates against him on the basis of that disability. Second, he alleges that he would be qualified for integration with other prisoners but for CDOC’s refusal to provide the reasonable modification of proper diagnosis and treatment of his mental illness. Third, he alleges that if -- even with proper treatment -- his mental illness continues to render him inappropriate for integration with other prisoners, he is qualified for a number of benefits -- for example, good time credit, phone calls, canteen items -- that he is now being denied, but for the reasonable modification of CDOC policies necessary to provide those benefits to a prisoner in ad seg.

Defendant argues that Mr. Anderson’s claim is simple medical malpractice, not actionable under the ADA. To the contrary, the Tenth Circuit has made clear -- in a case on which Defendants rely -- that claims of discrimination relating to medical treatment may be

⁴ “Reasonable modification” and “reasonable accommodation” are identical standards. *McGary v. City of Portland*, 386 F.3d 1259, 1266 n.3 (9th Cir. 2004).

actionable under the ADA. *See Rashad v. Doughty*, 4 Fed. Appx. 558, 560 (10th Cir. 2001) (*cited in MTD at 14*); *see also United States v. Georgia*, 546 U.S. 151, 157 (2006) (“deliberate refusal of prison officials to accommodate [an inmate’s] disability-related needs in such fundamentals as . . . medical care, and virtually all other prison programs constitute[s] ‘exclu[sion] from participation in or . . . deni[al of] the benefits of’ the prison’s ‘services, programs, or activities’”). Mr. Anderson’s ADA and RA claims do not seek adequate medical treatment; rather, as explained above, these claims seeks reasonable modifications that would permit him to be integrated and/or to receive programs and services available to other prisoners.

A. CDOC Violates the ADA and RA by Denying Mr. Anderson Access to Prescribed Medications.

Defendant CDOC is denying Mr. Anderson access to two types of medication, both of which were prescribed for him by CDOC’s doctors, and both of which are common medications for ADHD. Compl. ¶ 64. By dint of the prescriptions, Mr. Anderson is qualified to receive these medications. He has, furthermore, alleged that all similar medications, the most common for his ADHD disability, are excluded from the formulary. *Id.* ¶ 65. Thus, the prison formulary discriminates against individuals with Mr. Anderson’s disability.

“Access to prescription medications is part of a prison’s medical services and thus is one of the ‘services, programs, or activities’ covered by the ADA.” *Kiman v. New Hampshire Dep’t of Corr.*, 451 F.3d 274, 286-87 (1st Cir. 2006). As such, CDOC’s denial of Mr. Anderson’s prescriptions is not “a medical ‘judgment’ subject to differing opinion -- it is an outright denial of medical services.” *See id.* at 287; *see also Hughes v. Colo. Dep’t of Corr.*, 594 F. Supp. 2d 1226, 1241 (D. Colo. 2009) (prisoner may state a claim for “discriminatory exclusion from generally

available medical services”); *McNally v. Prison Health Servs.*, 46 F. Supp. 2d 49, 58 (D. Me. 1999) (ADA claim alleged based on denial of access to prescription medication).

B. CDOC violates the ADA and RA by Failing to Provide Treatment Sufficient to Integrate Mr. Anderson With Other Prisoners

“Unjustified isolation . . . is properly regarded as discrimination based on disability.” *Olmstead v. L.C.*, 527 U.S. 581, 597 (1999), *see also Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180-81 (10th Cir. 2003) (same). In *Olmstead*, the Supreme Court held that reasonable modifications may be required to ensure maximum appropriate integration. *Id.*, 527 U.S. at 603-04; *see also Fisher*, 335 F.3d at 1181 (public entities required “to ‘make reasonable modifications’ . . . in order to avoid the discrimination inherent in the unjustified segregation of the disabled.”). Mr. Anderson would be qualified to be integrated with other prisoners if he were able to obtain -- as a reasonable modification -- proper treatment for his mental illness.

While Defendants characterize this as a medical malpractice claim, Mr. Anderson is not seeking adequate treatment *per se*, but rather the reasonable modification of CDOC’s policies so that he receives treatment sufficient to permit him to be integrated with other prisoners. This is an actionable request for reasonable modification under the ADA and RA. For example, in *Rouse v. Plantier*, 997 F. Supp. 575, 582 (D. N.J. 1997), *vacated on other grounds*, 182 F.3d 192 (3d Cir. 1999), the court held that the plaintiffs had stated a claim under the ADA when they argued that the failure of the defendant prison to treat their diabetes had “excluded [them] from participating in prison programs.”⁵ Where denial of treatment is tantamount to a denial of a

⁵ In the employment context, the Tenth Circuit has held that “an employer should normally consider whether a mentally disabled employee’s purported misconduct could be remedied through a reasonable accommodation. If so, then the employer should attempt the
(continued...)

reasonable modification of policies that results in exclusion from participation in other programs, it constitutes an actionable disability discrimination under the ADA and RA.

C. CDOC Violates the ADA and RA by Refusing the Reasonable Modification of Providing Mr. Anderson Access to Programs Available to Non-Segregated Inmates.

If the Court should hold that Mr. Anderson is not entitled to the reasonable modifications discussed above or if such measures should prove insufficient to permit Mr. Anderson to be integrated with other prisoners, he may continue to be housed in ad seg. Because this placement is based on conduct caused by his disabilities -- and thus for analytical purposes, by the disability itself⁶ -- it cannot be used as a basis for denying him access to benefits or programs available to other non-segregated prisoners. In light of the professed administrative, rather than punitive, purpose of ad seg, it makes no sense to withhold services from Mr. Anderson based on behavior that he cannot control and that CDOC will not provide the treatment to help him control.

A decision that it is necessary to house Mr. Anderson in ad seg is like a decision to segregate prisoners with mobility impairments for security or accessibility reasons. While segregation of individuals with disabilities is never preferable, where courts have held it to be necessary, they have further held that such prisoners may not be denied access to programs and benefits available in other units. For example, in *Pierce v. County of Orange*, 526 F.3d 1190

⁵(...continued)
accommodation.” *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1088 (10th Cir. 1997).

⁶ See *McKenzie v. Dovala*, 242 F.3d 967, 974 (10th Cir. 2001) (holding that “the ADA’s anti-discrimination provision ‘does not contemplate a stark dichotomy between “disability” and “disability-caused misconduct,”’ but rather protects both” and that “the ADA protects [an employee] from adverse employment action based on conduct related to her illness so long as she does not pose a ‘direct threat.’” (Internal quotations omitted)).

(9th Cir. 2008), the Ninth Circuit upheld a decision not to “mainstream” prisoners with mobility and dexterity disabilities. *Id.* at 1220. Because the segregated facilities had fewer programs, however, “disabled detainees -- solely by virtue of their status as disabled -- [had] no possibility of access to the superior services” in other facilities. *Id.* at 1221. As a result, the court held, any educational, recreational or other program offered to nondisabled inmates had to be made “similarly available” to the disabled plaintiffs. *Id.* at 1222.⁷

There are a number of programs and services for which Mr. Anderson would be qualified but for his placement in ad seg, that is, but for his disability. And the fact that he is in ad seg cannot be used to deem him “unqualified.” *See Alexander*, 469 U.S. at 301 (“The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled.”). Following discovery, a program-by-program analysis will be necessary to determine whether it would be reasonable to provide Mr. Anderson each of the services he is currently being denied based on his placement in ad seg. Meanwhile, at this juncture, Mr. Anderson has stated claims for violating the ADA and RA.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that this Court deny Defendants’ Motion to Dismiss.

⁷ *See also Love v. Westville Correctional Center*, 103 F.3d 558 (7th Cir. 1996) (holding that denying quadriplegic prisoner housed in infirmary access to educational and other programs violated the ADA); *cf. Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1031 (D. Kan. 1999) (accommodating amputee prisoner in an accessible but isolated cell “would have effectively confined plaintiff to a small area with no opportunity to move about, without the privileges enjoyed by the other inmates, in a segregated area of the jail used for punishment of inmates -- all on account of his disability.”).

Respectfully submitted,

s/ Amy F. Robertson

Amy F. Robertson
Fox & Robertson, P.C.
104 Broadway, Suite 400
Denver, CO 80203
Ph: 303-595-9700
Fax: 303-595-9705
Email: arob@foxrob.com

s/ Brittany Glidden

Brittany Glidden
Laura L. Rovner
Student Law Office
University of Denver Sturm College of Law
2255 E. Evans Ave.
Denver, CO, 80208
Ph: 303-871-6140
Fax: 303-871-6847
Email: bglidden@law.du.edu

Attorneys for Plaintiff

Dated June 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

Chris W. Alber
Assistant Attorney General
Corrections Unit
Civil Litigation and Employment Law Section
Attorneys for Defendants
1525 Sherman Street, 7th Floor
Denver, CO 80203
Telephone: (303) 866-4308
chris.alber@state.co.us

s/ Caitlin R. Anderson
Caitlin R. Anderson
Paralegal
Fox & Robertson, P.C.
104 Broadway, Suite 400
Denver, CO 80203
Telephone: (303) 595-9700
Fax: (303) 595-9705
TTY: (877) 595-9706
Email: canderson@foxrob.com